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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT DOWNS,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the First Amendment compels a public high school to share its bulletin boards with a teacher who wishes to express views and share materials antagonistic and contrary to the school district's (*i.e.*, the government's), when the school district controls the content of the boards for the purposes of speaking to its own constituents on the legitimate pedagogical subject of tolerance.

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STATEMENT OF THE CASE

The United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit" or the "panel"), in affirming the Central District of California's District Court's (the "District Court") grant of summary judgment, held that Petitioner Robert Downs ("Petitioner"), a teacher at Diane S. Leichman High School, a public school within the Los Angeles Unified School District ("Respondent"), was not entitled to relief as a result of Respondent's refusal to permit him to post materials on the High School's bulletin board. *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003 (9th Cir. 2000). The Ninth Circuit was correct in holding that Petitioner had no right to speak for the government or to control government speech. This same conclusion has been reached by this Court in other cases and no review of the Ninth Circuit's decision is warranted.

Petitioner is a teacher, and, therefore, an employee of Respondent. Petitioner attempted to post, and still desires to post, materials of his own choosing on Respondent's bulletin boards at Leichman High. The policy and practice of Respondent was, and is, that the school Principal had(s) oversight over the bulletin boards to enforce and maintain Respondent's control over the content of the displayed materials. By virtue of this authority, two Principals required Petitioner to remove certain of his materials based on the Principals' finding that they violated Respondent's policies and its pedagogical interests. Petitioner's reliance on case authorities that do not involve the prohibition of a *government employee* from exercising what he or she characterizes as "free speech," by use of the government's media, when the speech could reasonably be perceived as bearing the imprimatur of the government, do not aid Petitioner's cause here. Indeed, these authorities are simply inapplicable to the facts before this Court. This is not a case where the use of a school facility by outside parties is involved. There is no implication of a limited public forum or of free speech rights of students or members of the public. Moreover, despite Petitioner's complaints about events at locations other than Leichman High, such claims have no bearing on the factual scenario before this Court.

Rather, the facts here support the two prior rulings in *Downs*. Specifically at issue are one school's bulletin board displays, on a bulletin board not located in a public place. The displays were consistent with Respondent's legitimate pedagogical mission of tolerance and consistent with the school's policy and practice of monitoring the content of the displays. These displays were objected to by a schoolteacher who was not permitted to post material contrary to the articulated pedagogical mission. Respondent may, consistent with the Constitution, preclude Petitioner from using Respondent's closed forum to contradict Respondent's speech to its students. Respondent is entitled to control the content of the bulletin boards.

1. Respondent's Promulgation of Memorandum No. 111 And The School's Implementation By Displays On Its Bulletin Boards

On April 11, 1997, Respondent issued Memorandum No. 111. The Memorandum referred to a Board of Education resolution passed in 1992 designating June of each year as "a time to focus on gay and lesbian issues." (App. 3) The Memorandum specifically provided that the purpose of the earlier resolution was to "foster a climate that reduces fears related to difference and deters name-calling and acts of violence or threats motivated by hate and bigotry." Posters and materials were provided to the schools for display to help in "the elimination of hate and the creation of a safe school environment for all students." (App. 3-4) In 1997 and 1998 Leichman High School staff members created displays for the school's Gay and Lesbian Awareness bulletin boards consistent with Memorandum 111.[1] (App. 4) The posted

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[1] Both the District Court and the Ninth Circuit determined that Leichman High's bulletin boards were the only relevant fora. That holding is consistent with other case authority. See, e.g., *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985) (Forum defined by access sought by plaintiff); *Christ Brides Ministries v. Southeastern Pennsylvania Transportation Authority*, 1488

displays, while not requiring approval in advance, were subject to the oversight of the school Principal, who had the ultimate authority over the content of the board's displays. (App 4, 17-20) The Principal, in turn, was accountable to Respondent's publicly elected Board.

Petitioner objected to Gay and Lesbian Awareness Month at the school. (App. 5) In June of 1997 and 1998 he created his own displays for a Leichman High bulletin board. Both years Petitioner's displayed materials were consistent with what he believed to be his "Biblical mandate to promulgate the Gospel of Jesus Christ and to evangelize others by expressions" of his anti-gay and anti-lesbian lifestyle. (App. 5-9)

Both years the school Principal, Donna Olmstead, in 1997 and Joseph Marino in 1998, required Petitioner to remove those of his materials that each Principal determined were inconsistent with Memorandum 111 in light of their prejudicial content and as having religious commentaries. (App. 5-9) Both Principals were consistent in their application of Respondent's policy and practice of not permitting the bulletin boards in the school to be used indiscriminately. (App. 5-9, 17-18) Both Principals reserved the bulletin boards for materials that announced, explained, promoted, fostered, or otherwise complemented the education curriculum, the instructional program, or the pedagogical policies and practices established by or otherwise approved by the Board of Education. (App. 5-9, 17-19) In 1997 Respondent's counsel, Jesus Estrada-Melendez, wrote to Petitioner and informed him that the boards were not "free-speech zones" and that Principal Olmstead had the authority to determine whether the content was consistent with the school's mission with respect to Memorandum 111.[2] (App. 5-9) In 1998 Principal Marino told

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F.3d 242, 248 (3rd Cir. 1998); *Air Line Pilots Assoc. v. Department of Aviation of the City of Chicago*, 45 F.3d 1144, 1151-54 (7th Cir. 1995).

[2] Project 10 director, Virginia Uribe, who did not "create the curriculum", testified that one of the objectives of

Petitioner to remove his materials because they were "divisive and disrespectful of the rights" of several members of the staff. (App. 8-9) Thus, Respondent's policy, practice and oversight of the content of the bulletin boards at the school by the Principal to insure that the displayed materials were consistent with Respondent's pedagogical mission, was followed in 1997 and 1998 at Leichman High.

2. The Petition Relies Upon Numerous Misstatements Of Fact[3]

Petitioner's factual argument as set forth in his papers is nearly devoid of citations to the Appellate Record, and, in many instances, alleges facts entirely outside the Appellate Record. It is axiomatic that anything outside the Appellate Record has no bearing on the instant Writ, and is of no legal moment. Indeed, many of Petitioner's factual assertions are inaccurate representations or misstatements of the underlying record as found by both the District Court and the Ninth Circuit.

Given Petitioner's mischaracterization of the factual record, and his failure to even attempt to support it with the Appellate Record, it seems likely that he wishes this Court to make factual findings contrary to those made by both lower Courts.[4] Petitioner sets forth numerous facts, the correctness of which are critical to his ability to convince this Court that the holding in *Downs* is in error. Yet, absent providing support, support that does not exist in the Appellate Record,

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Memorandum 111 was to provide students with "different points of view"; she did not say that the views could be anti-gay, anti-lesbian, ethnically derogatory or of a religious nature. See Petition at pages 10, 26.

[3] Respondent is mindful that it must point out factual errors in the Petition or an objection based on such incorrectness may be deemed waived. Sup. Ct. Rule 15.2.

[4] *See e.g.*, Petition at page 14 where facts are described as "holdings" apparently to circumvent this Rule.

this does nothing to forward his cause. Supreme Court Rule 10 provides "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The Appellate Record shows that school staff, who were answerable to the person charged with the responsibility for insuring that the materials on the bulletin boards were appropriate, the school's Principal, created the displays. (*See, e.g.,* App. 5, 16.)[5] Petitioner, on the other hand, contends that the displays made on the Leichman High bulletin boards pursuant to Memorandum No. 111 were made by persons who carried the identifier "homosexuals," yet he provides no Record supporting this claim.[6] In fact, the Appellate Record presumes the opposite conclusion. (*See e.g.* App. 4-5) Nor were "administrators, teachers, staff, non-employees, parents, students, and outside advocacy groups . . . solicited to create display," nor was "'whomever' may want to display materials" permitted to do so on Leichman High bulletin boards.[7] (*See e.g.* App. 4-5, 11, 16, 36-37) Nor was there any evidence that Leichman students "created their own displays."[8] (*See e.g.*

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[5] "There is no evidence in the record that individuals other than faculty and staff at Leichman High posted these or any other materials on the school's Gay and Lesbian Awareness bulletin boards." " . . .[T]he faculty and staff alone posted material on the bulletin boards . . .." App. 5.

[6] *See e.g.,* Petition at pages 7, 8. Even were it a true characterization it would be of no moment to the legal analysis of this case. Surely the purpose in so labeling the persons who worked on the displays is an attempt to inflame the Court.

[7] Petition at pages 3, 10, 15, 16, 20, 21. If materials had been posted by outside sources, that would have been contrary to Respondent's policy and they would have been subject to removal by the Principal if encountered.

[8] Petition at page 16. Indeed, Leichman High School, the forum at issue here, is a special education school for

App. 4-5, 11, 16, 36-37) Rather, The fact that some of the displayed materials may have originated with students or an off campus group does not equate with the students' or groups' creation of the display itself.[9] (*See e.g.* App. 4-5, 11, 16, 28, 37) Any unsupported statement by Petitioner to the contrary is of no moment, and is a fundamental misstatement of fact regarding the identity of the bulletin board's speaker. The Ninth Circuit and the District Court found that the speaker was Respondent. (*See e.g.* App. 19-20).

Indeed, although citing in the Petition at length to a quotation from *Interview with a Rapper*[10], Petitioner provides nothing to support the inference he hopes this Court will draw which is that this quotation was displayed at Leichman High or another school in the School District. The reason for this failure is simple; there is no such support in the factual record, and any argument that it was displayed is a misstatement of fact.[11]

The information that was actually displayed on the boards in keeping with Respondent's message of tolerance is far different from those isolated passages that Petitioner so likes to recite at length.[12] (App. 44-46) For example, at Leichman High there were posters displayed titled "The Civil Rights Movement", "Diversity is Beautiful, and "What is a Family." As both the District Court (App. 33) and the Ninth Circuit (App. 5) made clear, this case is about Petitioner's display and Respondent's bulletin boards at *one location*;

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severely handicapped students, most of whom have difficulty with reading, among other skills.

9 Petitioner does not contend that the displays themselves came from off campus groups. Petition at page 11.

10 Petition at pages 3-5, 22. Nor was there a "disavowal" by Respondent of the materials in the Leichman High display.

11 Project 10 discussed by Petitioner (pg. 5) is a private group to which some teachers belong.

12 Petition at pages 3-6.

Leichman High School. This case is not about what may have occurred at some other school, or materials not displayed.

Petitioner's contention that there was an "official policy of initial acceptance and later removal . . . merely because a few people objected " to his materials[13] is again not supported by the factual record, and is untrue. As the Record actually proves, Petitioner's *offending* materials were ordered removed because the person with that authority, the school Principal, determined that his displays were not consistent with Memorandum 111's mission of teaching tolerance which was in Respondent's pedagogical interest.[14] (App. 3-4, 7, 9, 18, 41, 44, 46-48) It matters not when or what caused the Principal to initiate the review; rather it is the existence of the policy and practice of the review to insure compliance with Respondent's pedagogical mission that gave the school Principal the authority to order Petitioner's materials removed. (App. 4, 17-18, 20, 40-41) As the Ninth Circuit stated:

> That Leichman High's principals do not spend the majority of their days roaming the halls strictly policing – or, in Downs' point of view – censoring – the school's bulletin boards does not weaken our conclusion that there is no genuine issue of material fact concerning whether Olmstead and Marino had the authority to enforce and give voice to school district and school

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13 Petition at page 24.

14 Petitioner complains that materials in the school's display may have offended some people yet were permitted to remain there. (Petition at page 8.) That is because those materials, unlike Petitioner's, were consistent with the message of Memorandum 111. Additionally, Petitioner is incorrect when he claims that his materials "are used elsewhere in Respondent's displays and been included in its curricular materials." (*Id.)*

> board policy. Inaction does not necessarily demonstrate a lack of ability or authority to act. (App. 17)

Petitioner concedes that there was no review that approved his materials before they were displayed as he admits that they were posted "without prior review."[15] Once the Principal reviewed Petitioner's materials, and some, not all, were determined to be inconsistent with Respondent's pedagogical mission of teaching tolerance,[16] the inconsistent materials were ordered to be withdrawn. (App. 7-8, 17-20, 32).[17]

There is also no support for Petitioner's contention that those persons who objected to Petitioner's display were only those "who had created their own display with an opposite viewpoint".[18] Similarly, Petitioner's claim that "Respondent's counsel stated that the displays are "extra-circular activity (sic)"[19] is also inaccurate. Respondent's counsel, at oral argument, merely agreed with the District Court's statement that the School Board's display at the school was not " . . .

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15 Petition at page 8.

16 Petitioner says that he placed "articles from major newspapers similar to those displayed on the homosexual teachers' display. (sic)" (Petition at page 7.) Hardly. Petitioner's materials were anti-gay and anti-lesbian tracts or of a religious nature.

17 Petitioner asserts that "Respondent revised its Policy during the litigation to state that no person may express a contrary viewpoint whether it be verbally or through casual conversation between two persons in the hallway". (Petition pg. 27) This too, is unsupported by any Appellate Record, and is incorrect.

18 Petition at page 24.

19 *Id.* and at page 29.

algebra or history. We're talking about a school newspaper which is sort of an extra-curricular type of activity."[20]

In fact, Petitioner's discussion regarding "The Non-Government Speech in Displays"[21] entirely misses the point. The materials referred to (again absent any factual Record support) are inapposite to those of Petitioner's materials that were ordered removed, and are therefore of no moment. Moreover, Petitioner has conceded that Respondent's "action in this case relates to its curriculum,"[22] which is in accord with Memorandum 111's mandate that it is "part of the curriculum."

ARGUMENT

1. This Case Is Not Appropriate For Review By The Supreme Court

Review on a writ of certiorari is not a matter of right, but of judicial discretion exercised under compelling circumstances. Sup. Ct. Rule 10. There is no conflict between *Downs* and any other United States court of appeals holding, nor is there a conflict between *Downs* and any state court of last resort. Additionally, as noted above, Rule 10 provides that a petition for a writ of certiorari is rarely granted where a petitioner contends that there are erroneous factual findings or the misapplication of a properly stated rule of law.

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20 Petition at pages 9-10. Respondent's counsel agreed that it was the "same genre" as the school newspaper in *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988) discussed *infra,* at p. 11.

21 Petition at page 9.

22 App. 38 at footnote 3.

2. The Ninth Circuit's Holding In *Downs* Is Not In Conflict With This Court's Rulings On Similar Governmental Free Speech Issues Or With This Court's Holdings In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) and *Rosenberger, et al. v. Rector and Visitors of the University of Virginia, et al.*, 515 U.S. 819 (1995).

Petitioner contends that he is entitled to the use of a school's controlled bulletin board to exercise a right to free speech. Petitioner is wrong. Respondent, as Petitioner's government employer, has the right to determine the content of the speech on the bulletin board at issue here.

The Ninth Circuit held that "when the school district speaks through bulletin boards that are not 'free speech zones,' but instead are vehicles for conveying a message from the school district, the school district may formulate that message without the constraint of viewpoint neutrality."[23] In so doing the panel relied upon or distinguished several holdings of this Court including *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788 (1985), *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and *Rosenberger, et al. v. Rector and Visitors of the University of Virginia, et al.*, 515 U.S. 819 (1995).

Petitioner contends that the panel's decision is in conflict with *Rosenberger* and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).[24] Petitioner's position is untenable. As discussed below,

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[23] App. 29-30.

[24] Petition at pages 13, *et seq*.

holdings in both *Rosenberger* support the Ninth Circuit's decision and *Lamb's Chapel* has no application here.

A. *Hazelwood's* Holding Is Consistent With *Downs*

In *Hazelwood*, this Court made clear that where the intended speech will be made by the use of a government forum that has not been made available to those who were not speaking for the government that such a forum may not be employed by those not speaking as the government. There can be no question that the Leichman High bulletin boards are fora consistent with the school newspaper in *Hazelwood,* and the use of them may be precluded by Respondent.

Hazelwood, while consistent with the holding in *Downs*, was factually different. *Hazelwood* involved student speech, not a government employee's speech, but, like *Downs,* the proposed speech was through use of government media. There this Court analyzed the rights of students to have two articles published in a school-sponsored newspaper. The Principal, who had pre-publication approval authority, had pulled both articles from the paper. The newspaper was produced and taught by a teacher in the school's Journalism class as part of the school's curriculum. The Court found that, in the absence of the school having opened the newspaper up by "'policy or practice'" to "'indiscriminate use by the general public'",[25] the newspaper was not a public forum. *Hazelwood,* 484 U.S. at 267. This Court held that: "If the facilities have instead been reserved for other intended purposes, 'communicative or otherwise,' then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, *teachers*, and other members of the school community." (Emphasis added.) *Id.*

Hazelwood held that a school, either "as publisher of a school newspaper or producer of a school play" may

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[25] Citing *Perry Education Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37, 47 (1983).

"'disassociate itself'"[26] from "speech that is, for example, . . . *biased or prejudiced.*" (Emphasis added.) *Hazelwood,* 484 U.S. at 271. The Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood,* 484 U.S. at 273. Petitioner's display was for the purpose of directly contravening Respondent's message of tolerance of gay and lesbian lifestyles because he disagreed with those lifestyles based on his religious beliefs. Thus Respondent, consistent with *Hazelwood*, could remove Petitioner's message of intolerance from Respondent's bulletin boards at Leichman High.

B. Where The School Itself Is Perceived as the Speaker, Free Speech Rights May Be Limited

Respondent has the right to use its controlled bulletin boards at Leichman High to convey its legitimate pedagogical message to its students. Furthermore, given these circumstances, Respondent has the right not to have its message contradicted by its own employee by the use of a controlled bulletin board at the high school where the speech would be perceived as that of Respondent. As stated by the Ninth Circuit, speech that will be perceived as that of the school is "less protected." (App. 12)

Petitioner simply does not comprehend that the use of school facilities by outside groups, or the support of different student viewpoints by use of a limited or public government forum, involves a different analysis than does speech by a government employee using the government's forum (which is neither a limited nor public forum) to offer an opinion that is contrary to that of his government employer's opinion. As the Ninth Circuit held, this is a case ". . . of the government itself speaking, whether the government is characterized as Leichman High, LAUSD, or the school board." (App. 16) As

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[26] Citing *Bethel School Dist. No. 403 v Fraser*, 478 U.S. 675, 685 (1986).

stated in *Rosenberger*, "A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech which is controlled by different principals." *Rosenberger,* 515 U.S. at 834 (Citing *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens,* 496 U.S. 226 (1990) and *Hazelwood.*) Those "different principals" are what control here.

This Court has unequivocally held that "The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." *Rosenberger,* 515 U.S. at 829 citing *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* supra, 473 U.S. at 806[27] and *Perry Education Assn.*, 460 U.S. at 46. That is exactly the situation here. Both the Ninth Circuit (App. 11) and the District Court (App. 33) found that the bulletin boards at the school were non-public fora containing only the government's speech. Both the Ninth Circuit (App. 24) and the District Court (App. 33, 38) found that Memorandum 111 was a legitimate exercise of Respondent's pedagogical mission, as was the requirement that Petitioner remove his materials that were inconsistent with that mission. Respondent's topic was tolerance, Petitioner's intolerance. This Court could not determine otherwise on the record.

Petitioner's reliance on *Santa Fe School District v. Doe,* 530 U.S. 290 (2000)[28] does not support Petitioner's contentions here. *Santa Fe* is an Establishment Clause case regarding a pre-football game prayer. The Court did discuss the concept of a restricted forum, but only in a way that is consistent with Respondent's position that the bulletin boards at the Leichman High were restricted and created the perception that the displays carried the approval of the school

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27 *Cornelius* requires that there must be a "clear intent to create a public forum." *Cornelius,* 473 U.S. at 802-803, cited in *Hazelwood*, 484 U.S. at 270.

28 Petition at pages 17, 28.

administration.[29] *See Santa Fe School District,* 530 U.S. at 311, 314.

Similarly, *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217 (2000) relied upon by Petitioner[30] is also of no aid to his cause. *Southworth*, much like *Rosenberger*, involved the expenditure of mandatory student fees. The Court's analysis focused on whether there was viewpoint neutrality in the mechanism to disburse the fees to various qualified student programs of an extra-curricular nature. *Southworth,* 529 U.S. at 233-34. Here, the facts require an analysis of whether the displays were government speech, specifically by Respondent, which speech was made in keeping with its pedagogical mission of teaching tolerance. As the Court in *Southworth* noted: "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Southworth,* 529 U.S. at 235. The same result is compelled here, and the electorate, not Petitioner by use of Respondent's restricted forum, may compel a change in any such governmental speech.

C. Respondent's Action In Prohibiting Petitioner From Posting His Materials On Respondent's Bulletin Board Was Reasonable And Consistent With Respondent's Pedagogical Mission

There is no dispute that the displays during Gay and Lesbian Awareness Month were for the specific purpose of promoting tolerance to deter name-calling, acts of violence or threats motivated by hate and bigotry. (App. 24) Equally, there is no dispute that Petitioner's display was motivated by a

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29 At one point Petitioner states that the displays were created without "supporting curriculum". (Petition at page 26.) That is because the displays were the curriculum.

30 Petition at pages 27, 28.

belief that there should be no recognition of Gay and Lesbian Awareness Month, that gay and lesbian lifestyles were wrong, and, therefore, that they should not be tolerated. As the District Court observed, were it Black History Month, a teacher would justifiably be prohibited from posting racist material on the school's bulletin boards. (App. 28) This case is no different.

That it is appropriate for the school Principal to determine whether Petitioner's materials stayed or came down has been recognized this Court: "This standard [of control over speech so long as the actions are reasonably related to legitimate pedagogical concerns] is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, the state and local school officials, and not federal judges." *Hazelwood*, 484 U.S. at 273. *See also, Cornelius* 473 U.S. at 808 where the Court held:

> The Government's decision to restrict access to a nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated.[31]

In ordering Petitioner to take down those materials that were inconsistent with the mission of Respondent's Memorandum 111, Leichman High's Principals were acting in accordance with the Constitution and their right and authority to do so.

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31 Citing *Perry Education Assn.*, 460 U.S. 37 (1983)

D. *Lamb's Chapel* and *Rosenberger* Do Not Control Where The Issue Is A Government Employee's Speech Using the Government's Forum And Not The Use Of A Limited Public Or Public Forum

In quoting from the Ninth Circuit's opinion in *Downs,* to argue that the panel's analysis regarding the application of *Rosenberger*[32] was incorrect, Petitioner leaves out the next sentence in the opinion which reads as follows: "However, that [Petitioner's] postings did indeed 'focus on gay and lesbian issues', does not mean that they satisfied all aspects of [Respondent's] policy as announced in Memorandum 111." (App. 24.) The court then went on to explain the purpose of the Memorandum, a point that Petitioner either ignores or does not comprehend. (*Id.*) The Ninth Circuit noted that Memorandum 111 "made clear that it was 'the District's multicultural and human relations education policy' to 'Educat[e] for Diversity' and that this included the expectation that all students would be given equal access to a quality education and the academic and social activities of the school." (*Id.)* The Ninth Circuit also noted that in Respondent's view Petitioner's materials "harmed, rather than helped, the promotion of tolerance for and appreciation of diversity." (*Id.*)

In *Rosenberger* the Court addressed an issue of the disbursement of student mandatory fees by the University of Virginia to reimburse the cost of printing a paper produced by a student group named Wide Awake Productions ("WAP"). WAP had obtained Contracted Independent Organization ("CIO") status, which made it eligible for use of the funds. An agreement signed by the University and each CIO specifically provided that the organizations were not part of or controlled by the University and that the CIO status should not be misinterpreted to mean that the University "approves of the organizations' goals or activities." *Rosenberger*, 515 U.S. at 823-24.

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32 Petition at page 14.

There were Guidelines for the use of the funds that specified that certain uses would not be reimbursed. Among the excluded uses of the funds were "religious activities" defined as "any activity that 'primarily promotes or manifests a particular belief in or about a deity or an ultimate reality.'" *Rosenberger*, 515 U.S. at 825. WAP was formed "'to publish a magazine of philosophical and religious expression' 'to facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints.'" *Rosenberger*, 515 U.S. at 825-26.

In *Rosenberger* the Court found that the University had created a limited forum and thus was subject to a test that distinguished between content discrimination "which may be permissible if it preserves the purposes of that limited forum, and on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." Citing *Perry Education Assn.*, 460 U.S. at 46. *Rosenberger,* 515 U.S. at 830-31. In the instant case there are no facts that could reasonably be interpreted to support a finding that the Leichman High bulletin boards were a limited forum as was the forum in *Rosenberger.* Thus, due to the factual differences between this case and *Rosenberger*, that holding does not control here.

Lamb's Chapel similarly does *not* involve speech by a governmental employee using the government's property to facilitate that speech. Rather, it dealt with after-hours use of a school facility that was opened to numerous outside groups, but denied to one because of its religious message. *Lamb's Chapel,* 508 U.S. at 387-390. So different are the issues in *Downs* from those in *Lamb's Chapel,* that *Hazelwood*, a case that Petitioner claims controls the outcome here,[33] was not even cited in the later decided *Lamb's Chapel.*[34] Similarly, the

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[33] Petition at page 17.

[34] Nor did the Ninth Circuit discuss *Lamb's Chapel* in *Downs*.

only citation to *Hazelwood* in the majority opinion in *Rosenberger*, a case that extensively discusses *Lamb's Chapel*, is where the Court distinguishes the factual setting of *Rosenberger* from *Hazelwood*.[35] Thus *Lamb's Chapel* is inapplicable here.

CONCLUSION

The Ninth Circuit's decision in *Downs* is consistent with the rulings of this Court and review of any factual analysis to resolve Petitioner's claimed factual error by the court of appeals is inappropriate. Accordingly, this Court should deny the petition for *certiorari*.

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Respectfully submitted,

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35 *Rosenberger*, 515 U.S. at 834.